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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

BENITO ARROYO,

Defendant and Appellant.

D052681

(Super. Ct. No. SCS206334)

APPEAL from a judgment of the Superior Court of San Diego County, William H. Kennedy, Judge. Affirmed.

Benito Arroyo was convicted of second degree murder. It was found true he used a dangerous or deadly weapon within the meaning of Penal Code¹ section 12202, subdivision (b)(1), that he suffered two prior convictions within the meaning of section 667, subdivisions (b)-(i), and suffered two prior terms of imprisonment within the meaning of section 667.5, subdivision (b). Arroyo was sentenced to a prison term of 48

¹ All further statutory references are to the Penal Code unless otherwise specified.

years to life. He appeals, arguing the evidence was insufficient to support a finding of second degree murder, the trial court erred in failing to instruct concerning unreasonable self-defense and involuntary manslaughter and erred in instructing concerning the concept of adoptive admissions.

FACTS

A. Prosecution Case

In 2006 a small community of mostly homeless persons lived in an encampment in a rural area of the City of San Diego near the Mexican Border. On November 6, 2006, three members of that community, Antoinette Dominguez (Antoinette), Lisa Silva and Enrique Huggins, decided to ride by bike to a nearby recycling center. The women had their own bikes. Huggins, with appellant's permission, borrowed a bike that belonged to Jennie, a friend of appellant.

As the three left the encampment, a friend offered to drive Antoinette to the recycling center. Antoinette gave her bike to Huggins because it was better than the one appellant loaned him. Huggins hid the bike he got from appellant intending to retrieve it when he returned.

Soon after, Silva and Huggins saw the bike in the back of a truck driven by Charles Myrick, another resident of the encampment. Silva told Myrick the bike belonged to Jennie. Myrick stated he would return it. That evening, appellant asked Huggins about Jennie's bike. Appellant was upset when told the bike was missing.

The next day, appellant, still angry about the missing bike, went with Huggins to an area of the encampment where Myrick lived. The two encountered Victor Dominguez

(Victor) who directed them to the backyard where Myrick was working. When appellant confronted him, Myrick stated he did not have the bike but would get it back. As Myrick turned to walk away, appellant grabbed him, turned him around and stated: "Don't walk away from me when I am talking to you." Appellant then stabbed Myrick in the arm and back with a knife. As Myrick staggered and fell to the ground, appellant and Huggins walked away.

Victor did not see the confrontation but heard appellant arguing with Myrick. As appellant and Huggins returned, Victor heard one of the men use the term "stick," and heard Huggins say to appellant: "Hey, you shouldn't have handled it that way. You didn't have to handle it that way." Appellant stooped down to tie his shoelace. As he did so, Victor, apparently concerned that Huggins had been stabbed, asked what had happened and "Did you stick him?" Huggins nodded, yes. Victor asked if Myrick was badly hurt. Huggins again nodded, yes. Appellant was kneeling in a position that did not allow him to see Huggins nodding. Victor ran to the backyard and saw Myrick on the ground. The police were called. Myrick died from his wounds.

As the police arrived, appellant asked Antoinette to lock him in the recreational vehicle where he lived. She did so. Later that day, police arrested appellant. As officers drove appellant to the police station, he stated: "I am enjoying my last view."

B. Defense Case

Appellant did not testify and offered no witnesses. Defense counsel argued the police focused on appellant from the beginning of their investigation and did not adequately investigate the possibility that Huggins was the assailant. Counsel argued

there was a reasonable doubt of appellant's guilt based on the possibility that Huggins was the killer and merely testified against appellant to protect himself.

DISCUSSION

A. *Sufficiency of Evidence*

Appellant argues the evidence was insufficient to convict him of second degree murder. Essentially, appellant argues that, while it is clear based on independent evidence that he was present when Myrick was stabbed, the only evidence that he and not Huggins was the killer was Huggins's testimony. Appellant contends Huggins's testimony was not worthy of belief because he had a motive to accuse appellant of the crime, because his testimony was inconsistent in part with the testimony of other witnesses and because his behavior was as incriminating as appellant's.

In determining whether the evidence is sufficient to support the verdict, we review the entire record viewing the evidence in the light most favorable to the judgment and presuming in support of the verdict the existence of every fact the jury could reasonably deduce from the evidence. The issue is whether the record so viewed discloses evidence that is reasonable, credible, and of solid value such that a rational trier of fact could find the elements of the crime beyond a reasonable doubt. (*People v. Carter* (2005) 36 Cal.4th 1114, 1156.)

The testimony of a single witness is sufficient to support a conviction unless that testimony is physically impossible or inherently improbable. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

While Huggins had a motive to incriminate appellant, and while, as is usually the case, all of his testimony was not perfectly consistent with the testimony of other witnesses, his version of events was not only possible but, in light of all the evidence, plausible. That appellant may believe the evidence was as sufficient to convict Huggins of murder as himself does not prove the evidence insufficient but explains why we submit cases to juries.

B. Instructions on Imperfect Self-Defense and Involuntary Manslaughter

Appellant argues the trial court erred when it refused his request to instruct the jury concerning the lesser-included offenses of voluntary manslaughter based on a theory of imperfect self-defense and involuntary manslaughter.

1. Background

Conceding that an instruction on involuntary manslaughter was a "reach," defense counsel nonetheless requested the jury be instructed concerning the offense. Counsel argued that given the nature of the two stab wounds, one to the arm and one to the back, it was possible the assailant did not intend to kill but merely to "send a message."

Defense counsel made no specific request for an instruction on voluntary manslaughter based on a theory of imperfect self-defense. The trial court, however, did ask if such an instruction was required.

The trial court stated it would instruct concerning voluntary manslaughter based on sudden quarrel of heat of passion but found insufficient evidence to instruct on either voluntary manslaughter based on imperfect self-defense or involuntary manslaughter.

2. *Law*

a. *Duty to Instruct*

The trial court should only instruct concerning a lesser-included offense when there is *substantial evidence* to support it. (*People v. Flannel* (1979) 25 Cal.3d 668, 684.) In this context, substantial evidence means evidence from which a jury composed of reasonable persons could conclude that the facts underlying the lesser-included offense exist. (*People v. Blair* (2005) 36 Cal.4th 686, 744-745.) Evidence which is minimal and insubstantial does not trigger a duty to instruct. (*People v. Flannel, supra*, 25 Cal.3d at p. 684.) On appeal we independently review the trial court's decision not to instruct on lesser-included offenses. (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.)

b. *Imperfect Self-defense*

A killing that would otherwise be murder may be reduced to voluntary manslaughter if the jury finds the defendant killed when he actually believed he was in imminent danger of being killed or suffering severe injury, actually believed deadly force was necessary to prevent that outcome but was unreasonable in believing the danger existed or the deadly response necessary. (CALCRIM No. 571.)

c. *Involuntary Manslaughter*

An unlawful killing done without the intent to kill and without a conscious disregard for human life is involuntary manslaughter. An unlawful killing that results from a willful act done with full knowledge and awareness that the person is endangering the life of another and done in conscious disregard of that risk is voluntary manslaughter

or murder. An unlawful killing that results from a willful act committed without intent to kill and without conscious disregard of the risk to human life is involuntary manslaughter. (CALCRIM No. 580.)

3. *Discussion*

The trial court properly did not instruct the jury concerning voluntary manslaughter based on imperfect self-defense or involuntary manslaughter. The only slightly contestable issue in this case was whether appellant or Huggins murdered Charles Myrick. Myrick was stabbed in the back and arm. The killing clearly resulted from an argument concerning a bicycle. The trial court properly instructed concerning the lesser-included offense of voluntary manslaughter based on sudden quarrel or heat of passion. The jury, not unexpectedly, rejected that theory. There was simply no evidence the killer acted in self-defense of any kind. Neither was there evidence that the killer lacked the intent to kill or acted with some state of mind other than a conscious disregard for human life.

C. *Instruction on Adoptive Admissions*

Appellant argues the trial court erred when it instructed the jury concerning adoptive admissions. He contends no evidence satisfied the requirements for treating as admissions by him statements made by other persons and the trial court erred in presenting the concept of adoptive admissions to the jury.

1. *Law*

Evidence Code section 1221 provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the

party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."

Such adoption or belief can be manifested either by explicit acceptance of another's statement or by silence or equivocal or evasive conduct. There are two requirements for the introduction of an adoptive admission: (1) the party to whom the statement will be attributed must have knowledge of the content of the statement; and (2) having such knowledge, the party must indicate by words or conduct his adoption of or belief in the truth of the statement. An admission may be deemed adopted by silence when a party is accused of committing a crime, under circumstances which afford him an opportunity to hear, understand and to reply and when a response would normally be expected if the statement were untrue. (*People v. Combs* (2004) 34 Cal.4th 821, 842-843; *People v. Riel* (2000) 22 Cal.4th 1153, 1189.)

A statement may be admitted as an adoptive admission when the evidence supports a reasonable inference that the statement was made under the required circumstances noted above. If that inference exists, then whether the statement is an adoptive admission is question of fact for the jury. (*People v. Riel, supra*, 22 Cal.4th at pp. 1189-1190.)

The decision to admit hearsay evidence and to determine the elements necessary for its admission rests in the discretion of the trial court and on review an exercise of that discretion will not be overturned absent an abuse of that discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113; *People v. Pirwani* (2004) 119 Cal.App.4th 770, 787.)

2. *Facts*

a. *Testimony*

Victor testified that on the day of the murder appellant and Huggins were looking for Charles Myrick. Victor directed the men to where Myrick was working. Victor could not see the confrontation between them but could hear appellant arguing with Myrick.

Victor heard a scuffle. As appellant and Huggins returned, Victor heard one of the men use the term "stick" and heard Huggins say to appellant: "Hey, you didn't have to handle it that way." Appellant stooped down to tie his shoelace. As he did so, Victor, apparently concerned that Huggins had been stabbed, asked the men what had happened and stated something to the effect of "What, did you guys stick him?" or "Did you just stick him?" Huggins nodded, yes. Victor asked if Myrick was badly hurt. Huggins again nodded, yes. Appellant was kneeling in a position that did not allow him to see Huggins nodding.

b. *Instructions Conference*

At the instructions conference, the defense objected to the prosecution's request that the jury be instructed in the terms of CALCRIM No. 357 concerning the concept of adoptive admissions.² The prosecutor stated the instruction was proper given Victor's

² As read to the jury, the instruction states: "If you conclude that someone made a statement outside of court that accused the defendant of the crime or tended to connect the defendant with the commission of the crime and the defendant did not deny it, you must decide whether each of the following is true:

"1. The statement was made to the defendant or made in his presence;

testimony that he asked appellant and Huggins "Did you stick him?" and then "[Was] he hurt bad?" to which Huggins responded in the affirmative but appellant made no response at all.

Defense counsel noted that when Victor made the statements, appellant was kneeling and tying his shoelace. Counsel argued there was no evidence appellant was aware Victor made the statements.

The trial court agreed to give the instruction and allow the parties to argue whether the requirements of the adoptive admission concept were satisfied.

c. Argument

During argument the prosecutor discussed the general concept of admissions by a party. He noted that appellant made several direct admissions indicating his involvement in the crime and engaged in other conduct amounting to an admission. The prosecutor reviewed the instruction on adoptive admissions. He argued the instruction might be applicable to a number of statements but focused on Victor's questions concerning whether appellant and Huggins had stabbed Myrick and whether Myrick was badly hurt. The prosecutor noted in the face of the questions appellant remained silent and argued that silence was an adoptive admission of Victor's implied accusation.

"2. The defendant heard and understood the statement;

"3. The defendant would, under all the circumstances, naturally have denied the statement if he thought it was not true; and

"4. The defendant could have denied it but did not.

"If you decide that all of these requirements have been met, you may conclude that the defendant admitted the statement was true.

"If you decide that any of these requirements has not been met, you must not consider either the statement or the defendant's response for any purpose."

Defense counsel essentially argued Huggins's nodding affirmative answer to Victor's questions was an admission by Huggins that he and not appellant stabbed Myrick.

3. *Discussion*

The trial court properly instructed the jury concerning adoptive admissions. There were at least two incriminating statements the jury could have found to be adopted by appellant. The first was the statement by Huggins to appellant, and overheard by Victor: "Hey, you didn't have to handle it that way." Appellant did not respond. Given the context and timing of the statement, the jury could conclude that Huggins was stating that appellant did not have to assault Myrick. The jury could reasonably conclude appellant heard the statement, would have naturally denied it if it was untrue and that his silence was an adoption of the implied accusation.

The second statement the jury could reasonably conclude was adopted by appellant was that made by Victor when appellant and Huggins returned from the scene of the stabbing. Victor asked something to the effect "Did you stick him?" or "What, did you guys stick him?"

The jury could reasonably conclude Victor believed based on what he heard that Myrick had been stabbed. Victor did not know who stabbed Myrick and, therefore, directed his inquiry to both men. It is clear Huggins heard the question because he responded. If Huggins heard Victor's statement, it is reasonable to believe appellant also heard it. Victor's question, under the circumstances, could reasonably be understood as an accusation. It would be natural for one who was not involved in the stabbing to so

state. Appellant's failure to do so could reasonably be taken by the jury as an adoption of Victor's implied accusation.³

The trial court acted within its reasonable discretion in instructing the jury concerning adoptive admissions.

The judgment is affirmed.

BENKE, Acting P.J.

WE CONCUR:

HUFFMAN, J.

McINTYRE, J.

³ It is clear appellant was unaware of Huggins's affirmative response to Victor's questions, and appellant, therefore, could not have adopted them.